TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 264.

JAMES W. HOSFORD AND CHARLES GAGNON, COPARTNERS UNDER THE FIRM NAME OF HOSFORD & GAGNON, PLAINTIFFS IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 3, 1885.

But whether this false answer regarding the mortgage incumbrance, found at the top of page 35 of the Record, can be considered or not, the other objections, already considered, to the validity of the policy, are, we submit, conclusive, and the third question must also be answered in the affirmative.

SAMUEL SHELLABARGER,
J. M. WILSON,
Attorneys for Defendants in Error.

17-404

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 19, 1887.

1 Pleas in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, before the Honorable David J. Brewer, judge of the circuit court of the United States for the district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the May term, 1885.

Be it remembered that on the 5th day of May, 1884, a transcript was filed in the office of the clerk of said circuit court, in which transcript is contained the petition, answers, reply, petition, and bond for removal, and certificate of clerk, in words and figures following, to wit:

Petition.

In the District Court in and for Richardson County and State of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Copartners in Business in the Firm Name of Hosford and Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY and ISRAEL MAY, Defendants.

The said plaintiffs, complaining of said defendants, for cause state—

1st. For that at the time hereinafter mentioned, and for a long time before and ever since, the said Hartford Fire Insurance Company, defendant, was and still is a corporation duly organized under the laws of the State of Connecticut, and has complied with all the laws of the State of Nebraska regulating the business of such insurance companies in the State of Nebraska, and duly authorized to do business in said State of Nebraska, with full power to insure

2 property against loss or damage by fire in the said State of Nebraska.

2nd. That on the 14th day of May, A. D. 1883, the said plaintiffs were the owner- of their four (4) story brick-&-stone metal-roof mill building and two (2) story frame metal-roof addition, known as the Rulo City mills, operated by the plaintiffs, with fixed and movable machinery, shafting, gearing, and belting all contained therein, and their frame, with stone basement, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith, and gearing, belting, scales, corn-sheller, fanning-mill, and other machinery contained in said elevator, all owned and occupied by said plaintiffs, situated on lots Nos. five and six (5 & 6), in block number five, in the town of Rulo, in said Richardson county and State of Nebraska.

3rd. That said insurance company, defendant, on said day, in consideration of the sum of one hundred and sixty ($160.00) dollars, there and then paid by the said plaintiffs to the said The Hartford Insurance Company, defendant, as a premium, executed and delivered to the said plaintiffs a policy of insurance on the said property in the usual form. The original policy having been destroyed by fire, the said plaintiffs are wholly unable to set forth a copy of

said policy of insurance; the said plaintiffs have, since the fire, requested the said insurance company, defendant, to furnish a copy of said policy of insurance to these plaintiffs, which they have wholly neglected and refused to do. In obedience to a request there was furnished from the office of the local agent of said company, at Falls City, in said county and State, the following "memoranda" relating to the said insurance of said property by the said insurance company, defendant, which said "memoranda" is all the paper that said plaintiffs have from said insurance Co., defendant, relating to
3 said insurance, and said plaintiffs ask that said insurance company, defendant, be required to file with *their* answer a copy of said policy of insurance or furnish said plaintiffs with a copy of the same to file with this their petition The said "memoranda" is here attached and marked Exhibit A and made a part of this petition. The said policy of insurance was issued and dated on said 14th day of May, A. D. 1883, and was to run for the period of one year or until May 14th, A. D. 1884, and was to insure the said plaintiffs on the said property to the amount of four thousand dollars ($4,000.00).

4th. That said plaintiffs further allege that on the night of the first day of August, A. D. 1883, the said property was burned and wholly destroyed, except only one grain cleaner, worth ($100.00) one hundred dollars; one corn millstone, worth ($100.00) one hundred dollars; and four (4) wood stave hoops, worth $20.00 each, or about ($80.00) eighty dollars for the (4) four hoops; two (2) Vandergrift machines, worth about $40.00 each, or ($80.00) eighty dollars for the two (2); two (2) silent grain feeders, worth about ($4.00) each, or ($8.00) eight dollars for the two, and about one hundred feet of belting and elevator buckets, worth about ($30.00). The total value of said property saved is about ($398.00) three hundred and ninety-eight dollars, and no more.

That said fire did not originate by any act, design, or procurement on the part of these plaintiffs, and none of the property was lost by theft at or after the fire, nor was the fire caused by invasion, insurrection, riot, civil commotion, military or usurped power, nor from any other cause mentioned in said policy as an exception touching the liabilities of said insurance companies, nor from any cause or causes whatsoever excepted to in the said policy of insurance.

4 5th. Immediately after the fire the said plaintiffs notified the said insurance company, defendant, of the said fire and loss of said property, and again, on the 20th day of August, A. D. 1883, the said plaintiffs gave said insurance company, defendant, a further notice and due proof of said fire and loss, and said plaintiffs have duly performed on their part all the conditions of said policy of said insurance.

7th. The said property above described and named in said "memoranda" and named and issued in said policy of insurance by said insurance company, defendant, was, when destroyed, worth twenty-one thousand nine hundred dollars ($21,900.00), and that these plaintiffs' loss thereby amounted to more upon each part of the property separately mentioned and insured in the said policy of insurance

than the amount of such separate insurance named in said policy of insurance, and also stated in said "memoranda" or Exhibit "A."

8th. And on the 1st day of November, A. D. 1883, the said plaintiffs demanded of said insurance company, defendant, the payment of said insurance, but *they* have wholly neglected and refused to pay the same.

9th. The said Israel May had and still has a mortgage on said property; that said mortgage does not exceed ($3,500.00) thirty-five hundred dollars; the said Israel May is made party to this action to the end that his interest herein be duly protected in this court.

No part of said insurance on said property has been paid, nor has the said The Hartford Insurance Company, defendant, replaced or offered to replace the said property, and there is now due from the said The Hartford Insurance Company, defendant, to the said plaintiffs on the said policy of insurance the sum of four thousand ($4,000.00) dollars, with interest thereon at the rate of seven (7) per cent. per annum from the second (2) day of August, A. D. 1883, for which said sum the said plaintiffs ask judgment against said The Hartford Fire Insurance Company, defendant, and for all costs.

HOSFORD & GAGNON, *Pl'ffs,*
By ISHAM REAVIS AND
C. GILLESPIE, *Their Attorneys.*

STATE OF NEBRASKA, }
Richardson County, } *ss:*

I, James W. Hosford, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled cause and have heard petition read and know the contents thereof, and all the facts alleged in said petition are true, as I verily believe.

JAMES W. HOSFORD.

Subscribed in my presence and sworn to before me on this 3d day of November, A. D. 1883.

T. C. CUNNINGHAM, *Clerk.*

Filed Nov. 3rd, 1883.

T. C. CUNNINGHAM, *Clerk.*

Attached to said petition is Exhibit "A," in words and figures following, to wit:

PLAINTIFFS' EXHIBIT A.

Hartford Fire Insurance Company, Hartford, Conn. Western department, Chicago, Ill.

Instructions to Agents.

Report every policy or renewal, the day it is made, on this blank; give full copy of the issue, without any abbreviations whatever; if a renewal, let copy of original policy be given in full; report one policy or renewal only on this sheet; let occupancy of premises and exposures be carefully and fully reported on the opposite side, and a

diagram accompany each risk; report endorsements made subsequent to the issue of policy on blanks for that purpose; mail to Western department office, Chicago.

Daily report; agency, Falls City, Neb., division No. 2, office number 634.

6 *Copy of Policy.*

A policy of insurance has been — in this company as per description in margin, the written portion of which is in the following words:

Four thousand dollars as follows:

$500 on their four-story brick-and-stone metal-roof mill building and two-story frame, metal-roof addition, known as "the Rulo City mill," operated by assured, and $2,500 on fixed and movable machinery, shafting, gearing, and belting, all contained therein, and $1,000 on their frame, with stone basement, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith, all owned and occupied by assured, situated on lots 5 & 6, block 5, in Rulo, Richardson county, Nebr., special reference being had to assured application No. 1056, which is hereby — a part of this policy and a warranty on the part of the assured, $8,000 additional insurance concurrent herewith permitted, loss, if any, payable to Israel May, mortgagee, as his interest may appear. Name of assured, —— ——.

Number of policy, 1056; for term of 1 year—from May 14th, 1883, to May 14th, 1884; amount insured, $4,000; rate, 4; premium, $160.00.

Separate Answer of Insurance Co.

STATE OF NEBRASKA, } ss:
Richardson County, }

In District Court for the March Term, 1884.

JAMES W. HOSFORD and CHAS. GAGNON, Partners in Business, Plaintiffs,

vs.

THE HARTFORD INSURANCE COMPANY and ISRAEL MAY, Defendants.

Now comes the above-named defendant, The Hartford Fire Insurance Company, and, for answer to the petition of plaintiffs
7 filed herein, says:

1st. It denies each and every allegation in said petition contained, except such as are hereinafter expressly admitted. This defendant admits the issue by it to said plaintiffs of a policy of insurance upon the property mentioned in said petition of the date and for the length of time therein charged, and that the property was partially destroyed by fire at the time in said petition alleged. It further admits that it is incorporated and empowered under the laws of the State of Connecticut and the State of Nebraska to do business within said State of Nebraska.

2nd. But these defendants, further answering, say that said plaintiffs shall not have nor recover of and from these defendants anything in this action, because before the making of the contract of insurance contained in the policy sued upon herein, and as a part of the said contract of insurance, and as an inducement to this defendant to enter into said contract of insurance, said plaintiff made a certain application in writing to these defendants for the issue to them (plaintiffs) by defendant the policy of insurance sued on herein; a copy of said application is hereby attached, marked "A," and made a part hereof. Said application was signed by said plaintiffs, and therein and thereby said plaintiffs stated, represented, and warranted this defendant that the buildings insured cost the sum of $7,000.00; that there were casks of water on each floor, and two (2) buckets with each cask for the sole purpose of extinguishing fire; that there were no mortgage, trust deed, lien, or incumbrance of any kind against the property insured, except a mortgage in favor of I.
May in the sum of $3,000.00; that the entire value of said prop-
8 erty was $21,000.00; that the cash value of the building insured above the foundation was $7,000.00; that the cash value of the machinery insured was $11,000.00; that the cash value of the engine and boilers was $3,000.00; that the said mill building was four stories high; that the boilers were encased in brick walls 18 inches thick; that the fuel was kept 10 ft. from the mouth of the furnace; that none of the machinery or shafting run in wooden boxes; that all parts of the machinery run cool; that said mill was doing a profitable business and had been for the year immediately preceding said application; that each and all of said statements, representations, and warranties so in said application were false and fraudulent, and so made by said plaintiff to this defendant for the purpose of procuring an insurance thereon for more than said property was worth, and that said defendant by reason of such false and fraudulent statements was deceived and misled, and thereby induced to issue said policy of insurance sued on; that if said application had contained only true statements in regard to the value, condition, and situation of property and the liens and incumbrances thereon this defendant would not have issued said policy nor had anything to do with said risk, and by reason of said false and fraudulent statements in said application and the breach by said plaintiff of the warranties therein contained said policy was void, and this defendant incurred no liability thereunder.

3d. And these defendants, further answering, say that the plaintiffs have never furnished the defendants with any proof of loss, as required by the terms and conditions of said policy, and that no action accrues to said plaintiffs on said policy until after such proofs of loss have been made and furnished to the defendants, as stipulated in said policy.

4th. And this defendant, further answering, says that the said plaintiffs, wickedly and corruptly intending to injure, cheat, swindle, and defraud this defendant out of a large sum of money,
9 falsely and fraudulently stated and represented to this defendant, by their application in writing, a copy of which is

hereto annexed and made a part hereof, that the actual cash value of the building above the foundation and the machinery therein upon which said policy of insurance was issued was $21,000.00, when, in truth and in fact, the same were only of the value of $9,000.00, and said plaintiff at the time well knew such to be the fact, and by such false and fraudulent statement and representation said plaintiffs procured from this defendant and other insurance companies insurance upon said property in a sum largely in excess of the actual cash value of said property, to wit, in the sum of $12,000.00, and that said overvaluation and fraudulent and false statements were so made to this defendant and other insurance companies to secure such excessive insurance, with the design on the part of said plaintiffs to destroy said property and make this defendant pay for the same, and that, in pursuance of such wrongful design, said plaintiffs caused or procured the fire which injured the property, as complained of in plaintiff's petition.

5th. And this defendant, further answering, says that, by reason of the failure and omission of plaintiffs to make known every fact material to the risk, as required by the terms of said policy, and by reason of their failure and omission to truly state the nature, amount, and in whose favor any mortgage, trust deed, lien, or incumbrance there was upon and against said property and their false and fraudulent statements concerning the same, by reason of their stating, representing, and warranting that the only mortgage, trust deed, lien, or incumbrances of any kind on said property was a mortgage for only the sum of $3,000.00, in favor of I. May, when, in truth and in fact, this defendant avers the fact to be that the mortgages upon said property to I. May was largely in excess of said sum of $3,000 and in fact was $4,000.00, and that there was other liens and encumbrances on and against such property at the time of making said application and still exist against the same, to wit, the sum of three hundred and thirty dollars ($330.00) for delinquent taxes upon and against said property for the taxes against the same for the years 1880, 1881, and 1882, all due and delinquent before said application was made and before said policy issued.

Wherefore this defendant prays that it may be hence dismissed with its reasonable costs herein expended.

MARTIN & GILMAN,
Att'ys for Def't.

STATE OF NEBRASKA, }
Richardson County, } *ss:*

I, Fred. W. Miller, being first duly sworn, depose and say: I am the agent of the above-named defendant, The Hartford Fire Insurance Company; that I know the contents of the foregoing answer and believe the same to be true.

FRED. W. MILLER.

Subscribed in my presence and sworn to before me this — day of February, 1884.

[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

"A."

Edition 1882.

To be submitted to G. F. Bissell, general agent, Chicago, before policy is issued.

Hartford Fire Insurance Co. of Hartford, Conn.

Survey of Steam Mill & Elevator.

No. 1056. Survey of Hosford & Gagnon at Rulo, Nebraska.
11 Owned and occupied by assured. Agency, Falls City, Nebr.; $4,000. Approved by Wm. J. Bissell; rate, 4%.

Application of Hosford & Gagnon, of Rulo, Neb., for insurance against loss or damage by fire by the Hartford Fire Insurance Company in the sum of four thousand dollars on the property specified, the value of the property being estimated by the applicant.

	Cash value.	Sum to be insured.	Rate.
Mill, 500 ---------- Elevator, 1,000 ----------	$7,000	$1,500	4
On building only ----------			
On fixed & movable machinery only in mill ----------	$11,000	$2,500	4

The applicant will answer the following questions and sign the same as a description of the premises on which the insurance will be predicated:

1. Name, &c.—Name? Hosford and Ganon. Location (give town, county, and State)? Rulo, Richardson Co., Neb. Distance from agency where this application is made? 10 miles.

2. Building.—Of what material? Brick, stone, & frame. Kind of roof? Metal. When built? 1879, 1880, & 1882. Cost when repaired? $7,000. Walls and ceilings, how finished? ——. Size of building? See diagram. Stories high? 2, 3, & 4. Any stairways in building? Yes. Are belt holes and door sills raised for flooding? Yes. Thickness of floors? ——. Number of employés? ——.

3. Boiler-house.—What material? Stone. Height? 14. Roof? Metal. Kind of floor? None. Any openings to main building? Yes. Are they protected by iron doors? No. Any dry-room in boiler-house? No. Any machinery other than boiler and engine in boiler-house? No. Is the boiler-room whitewashed inside? No.

4. Boiler.—Boilers, how many? 2. Arched with brick? Yes.

12 Smoke-stack and engine.—How thick are arch walls? 18 in. Distance from wood? 5 ft. Kind of fuel used? Coal, wood, & cobs. Stack, brick or iron? Iron. If iron, how far is wood of roof from stack and how protected? 6 in.; covered with metal. Height above roof of building? 18. Any spark catcher? No. If brick or stone base, how high does base rise above roof? ——. Where is engine located? West of and adjoining boilers.

Machinery.—Does any shafting or machinery run in wooden boxes? No. Is frame-work substantial? Yes. Has any part settled or sagged? No. Does shafting run true and cool? Yes. What kind of oil used for lubricating? Lard & machine. Is oiling done at regular hours each day? Yes. Is this duty assigned to a special man? Yes. Is machinery in good repair? Yes. What is average age of machinery? 2 years. Is it crowded? No. Is there any machinery not in use? No. If so, what? ——.

7. Dry-room.—Any on premises? None.

8. Heating.—How heated? Stove. Stoves, how many? (1) one. What under them? Zinc. How far from wood-work? Safe distance. What kind of fuel is used? Wood. Are stove-pipes well secured? Yes. Do they pass through floor or partition? No. Do they enter chimney? Yes. Are chimneys built from the ground? Yes. Are ashes ever kept in building? No.

9. Lights.—What is used for lights? Kerosene. If kerosene, what is its fire test? 150. Where kept and how? Tin cans. Any open lights used? No. Are lamps filled and trimmed by daylight only? Yes.

13 10. Facilities for putting out fire.—Any force pump on premises? No. Give source and extent of water supply. Casks of water on each floor. How many casks of water? 1. Where located? On each floor. How many buckets? 2, each cask. Where kept? At casks. Distance to nearest fire engine? None. Is there scuttle in roof? Yes.

11. Watchman & hours of work.—Is watchman employed? No. During what hours is mill (or factory) operated? From 6 a. m. to 12 p. m. Is building ever left alone? Yes.

12. Ownership.—Is property owned and operated by applicant? Yes. Is it now operated? Yes. Is it profitable and has it been for past year? Yes. Is ground owned by applicant? Yes. Has he unquestioned title in fee simple? Yes. Has there ever been litigation concerning property? No.

13. Incumbrance.—Is there a mortgage, trust deed, lien, or incumbrance of any kind on property? Yes. If so, state nature of same, amount, and in whose favor. $3,000.00; I. May. What is the entire value of property encumbered? $21,000.

14. Cash value.—What is cash value of building or buildings above foundations? $7,000. Machinery? $11,000. Boiler and engine? $3,000.

15. Insurance.—What is amount of insurance on building? $4,500. On machinery? $7,500. On boiler and engine? $—. Are all policies concurrent? Yes. What companies, what amount

each, and at what rates (state fully)? Underwriters of New York, $8,000, at 4 per cent.; Hartford, $4,000, at 4 per cent.

16. Litigation and loss.—Is there now, or has there ever been, any litigation about this property or power? No. Have you ever suffered loss of property by fire; and, if so, when? No.

17. Incendiarism and fire.—Have you any reason to believe that property is in any danger from incendiaries? No. Any threats ever been made? No. Is there now, or has there ever been, strikes or trouble with employés? No. Have the premises ever been on fire? No.

Applicants will answer such of following questions as apply to risk on which insurance is desired:

18. Wood & iron working shops or factories.—Kind of goods made? Flour. Are oiled rags and waste kept in metal vessels and burned every night? Yes.

20. Elevator.—Is it for wheat or corn? Both. If corn sheller, where located? See diagram.

21. Flour-mills.—Kind of mill—"merchant" or "custom grist-mill?" Both. Daily capacity in barrels? 60. How many run of stones? 5. How many sets rollers? None. How many 14 bran dusters and separators, and where located? 1, top floor; 2 separators. How many smut machines and where located? 1, ground floor. Whose make or pattern? California. Are lower boxes constantly supplied with tallow? Yes. What time operated? 1–4. How many revolutions per minute? 650. Are they in plain view and accessible? Yes. Is dust blown out of mill? Yes. Is there a "dust-room?" No. Any other cleaning machines in mill? No. Middlings purifiers, how many? 2. Kind, opened or closed? Smith & Co., city. Do you agree that no open lights shall be used in mill? Yes. Is machinery crowded in any part of mill so it is unsafe for men to go to any machine while mill is running? No. Is there a grain, meal, or corn dryer, and where located? No. Is there a corn sheller, and where located? Yes; in elevator. Do you agree to keep mill clean and free from dangerous accumulation of dust? Yes.

And the said applicant hereby covenants and agrees to and with said company, that the foregoing and diagram annexed hereto is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, encumbrance of all kinds, insurance, and hazard of the property to be insured, and the same is hereby made a condition of the insurance, a part of the contract, and a continuing warranty on the part of the assured for term of policy or any renewal thereof of which this survey and application form a part.

Dated at Rulo, Neb., this 16th day of May, 1883.

$4,000, for 1 year.

HOSFORD & GAGNON,
Applicants.

Duplicate.

Dollars 4,000. Number duplicate, 1056.

[Written across the face:] Void. Duplicate.

The Hartford Fire Insurance Company, Hartford Conn., incorporated 1810, by this policy of insurance, in consideration of the receipt of one hundred and sixty dollars and of the agreements and conditions herein contained, do insure Hosford and Gagnon to the amount of four thousand dollars for the term of one year, $500 on their four-story brick-and-stone
15 metal-roof mill building and two-story frame metal-roof addition, known as the Rulo City mills, operated by assured, and $2,500 on fixed and movable machinery, shafting, gearing, and belting, all contained therein, and $1,000 on their frame, with stone basement, metal-roof, steam-power grain-elevator building, and addition thereto, including bins, spouts, bridges, or driveways connected therewith, all owned and occupied by assured, situate on lots 5 & 6, block 5, in Rulo, Richardson county, Nebraska, special reference being had to assured application No. 1056, which is hereby made a part of this policy, and a warranty on the part of the assured $8,000 additional insurance, concurrent herewith, permitted loss, if any, payable to Israel May, mortgagee, as his interest may appear, against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, not exceeding the sum insured nor the interest of the assured in the property, except as hereinafter provided, from the 14th day of May, eighteen hundred and 83, at 12 o'clock noon, to the 14th day of May, eighteen hundred and 84, at 12 o'clock noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which shall in no case exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property from use or otherwise, and to be paid to the assured or their legal representatives sixty days after due notice and satisfactory proofs of the same are made by the assured and received at their office, in Chicago, in accordance with the terms of this policy hereinafter mentioned, and this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after a fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power, nor for any loss by fire
16 where such fire is occasioned by the fall of any building insured or of any building containing the property insured, or any part of such buildings; nor for any consequential or constructive damages to any building beyond what it would cost to repair or replace the same, whether such damage result from municipal ordinances or laws regulating or prohibiting the reconstruction or repairs of buildings or otherwise; nor for loss or damage to property in any other locality than where originally insured, unless written consent to removal is endorsed hereon; nor for any commissions or mer-

chandise in hands of consignees; nor for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused by removal of property from a building where there is no loss by fire unless such removal was necessary to preserve the property, in which case the damage shall be borne by both parties in proportion as the whole sum insured bears to the whole value of the property insured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire; and there can be no abandonment to the company of the property insured.

If an application, survey, plan, or description of the property herein insured is referred to in this policy such application, survey, plan, or description shall be considered a part of this policy and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation or omits to make known any fact pertaining to the risk, or if there shall be any other insurance, whether valid or otherwise, on the property insured or any part thereof at the time this policy is issued, or at any time during its continuance, without the consent of this company written hereon, or if the risk be increased by any means within the control of the assured, this policy shall be void; and immediately upon the

17 the passing or entry of a decree of foreclosure or upon a sale under a deed of trust or levy under an execution, or if the assured shall be adjudged a bankrupt, or if the property insured be assigned under any bankrupt or insolvent laws, or if any changes take place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree; or if the policy before loss be assigned without the consent of the company endorsed hereon; or if the assured is not the sole, absolute, and unconditional owner of the property insured; or if said property be a building or buildings and the assured be not the owner of the land on which said building or buildings stand, by title in fee simple, and this fact is expressed in the written portion of the policy; or if gunpowder, phosphorus, rubber, cement, fireworks, naphtha, benzine, gasoline, petroleum, or crude earth or coal oils are kept or used on the premises without written consent; or if the premises hereby insured are or shall hereafter become vacant or unoccupied and so remain for more than ten days, or, being a mill or manufactory, shall be run over or extra hours, or shall cease to be operated and so remain for more than ten days without notice to the company in each case and consent endorsed hereon; or in case of neglect or deviation from the laws or police regulations made to prevent accidents from fires, then and in that case this policy shall be void. Kerosene oil, if of the legal standard, may be used for lights, lamps to be filled and trimmed by daylight only; one barrel may be kept on the premises for this purpose, and also be kept in stores, in quantities not exceeding five barrels at any one time; if kept in greater quantities without written consent this policy shall be void. This policy may be canceled at any time at request of assured, the company retaining the customary monthly short rates for the time the policy

has been in force. It may also be canceled at any time by
18 the company, on giving written or verbal notice to that effect and refunding or tendering to the assured, or, if the policy be not held by him, to the legal holder thereof, a ratable proportion of the premium for the unexpired term of the policy.

In case of loss the assured shall give immediate notice thereof and render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured, or containing the property insured; other insurance, if any, and copies of the written portion of all policies; the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate, under the seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers and exhibit the same for examination, either at the office of this company or such other place as may be named by its agent, and permit extracts and copies thereof to be made,
19 and shall also furnish original or properly certified duplicate invoices of all property hereby insured, whether damaged or not damaged; shall submit to examination or examinations under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss, and subscribe such examination or examinations when reduced to writing; and a refusal to answer such questions and subscribe such examinations when reduced to writing shall cause a forfeiture of all claims under this policy. Loss or damage to real property partially or totally destroyed and personal property partially destroyed, unless the amount of said loss or damage is agreed upon between the assured and the company and shall be appraised by disinterested and competent persons, one to be selected by this company and one by the assured; and where either party demand it the two so chosen may select an umpire to act with them in case of disagreement, and if the said appraisers fail to agree they shall refer the differences to such umpire, each party to pay their own appraisers and one-half the umpire's fee, and the award of any two in writing shall be binding and conclusive as to the amount of such loss or damage; but no appraisal nor agreement for appraisal shall be construed, under any circum-

stances, as evidence of the validity of said policy or company's liability thereon. And in case personal property is partially destroyed or damaged, the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, or, if a building, by an estimate in detail; and the report of the appraisers, in writing under oath, shall form a part of the proofs hereby required, and until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. If the loss sustained be upon a building, fixtures, or machinery, the assured shall, if required, furnish duly verified plans and specifications of such property destroyed or damaged. The company reserves the right to take the whole or any part of the property so damaged at the appraised value, or to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within sixty days after receipt of the proofs herein required.

If any broker or other person than the assured or the duly authorized agent of this company has procured this insurance or any renewal thereof, he shall be deemed to be the agent of the assured and not of this company in any transaction relating to the insurance. Any fraud or attempt at fraud or any false swearing on the part of the assured shall cause a forfeiture of all claim under this policy.

Reinsurance to be on the basis that in no event will this company be liable for a sum greater than the portion reinsured bears to the whole sum insured by the company reassured, and in case of loss this company to pay *pro rata* at and in the same time and manner as the company reinsured.

It is expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim for damage by fire under this policy shall be sustainable by any court of law or chancery unless commenced within twelve months next after such fire shall have occurred, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding. And it is further expressly covenanted by the parties hereto that no officer, agent or representative of this company shall be held to have waived any of the terms and conditions of this policy unless such waiver shall be endorsed hereon in writing.

N. B.—Books of accounts, securities for money, evidences of debt, deeds, manuscript, money, bullion, plate, jewels, jewelry, medals, engravings, paintings, sculptures, ornaments, musical and scientific instruments, models, patterns, and curiosities, frescoes or wall decorations are not insured, unless particularly mentioned in the policy. Plate-glass doors and windows, when the plates are of the dimensions of nine square feet or more; fences and other yard fixtures, awnings, signs, sidewalks, prismatic lights outside of the wall lines

of any building, store furniture and fixtures, counters and shelving, goods on storage are not insured under this policy, unless separately and specifically mentioned.

This policy is made and accepted on the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire Insurance Company at Falls City, Neb.

In witness whereof the said Hartford Fire Insurance Company have caused these presents to be signed by their president and attested by their secretary in the city of Hartford and State of Connecticut.

GEO. L. CHASE, *President.*
C. B. WHITING, *Secretary.*

Countersigned at Falls City, Nebr., this 14th day of May, 1883.
FRED W. MILLER, *Agent.*

Duplicate.

Endorsed: Duplicate. No. 1056. The Hartford Fire Insurance Company, Hartford, Conn. Duplicate. To Hosford & Gagnon. $4,000. Premium, —. Filed December 14th, 1883. T. C. Cunningham, clerk. Duplicate.

22 *Answer of Defendant, Israel May.*

In the Richardson County District Court, State of Nebraska.

J. W. HOSFORD and CHARLES GAGNON, as Hosford and Gagnon,
vs.
THE HARTFORD FIRE INSURANCE COMPANY and ISRAEL MAY.

Now comes the defendant, Israel May, and files answer to the petition of plaintiffs filed herein, and says that there is due him on a mortgage held by him on the mill property described in said plaintiffs' petition, and to which reference is had on the policy of insurance sued on, the sum of three thousand three hundred and eleven dollars and fifty-six cents ($3,311.56), which said amount draws interest at the rate of 8 per cent. per annum from December first, 1883, and provided by agreement of parties that in case the interest is not paid when due it is to be added to the principal and draw the same rate per cent. until paid; for which sum, with his reasonable costs, he prays judgment.

ISRAEL MAY.

STATE OF NEBRASKA, } ss:
Richardson County, }

Israel May, being duly sworn, says that the facts stated in the above answer are true, as he verily believes.

ISRAEL MAY.

Subscribed in my presence and sworn to before me this 29th day of November, 1883.

[SEAL.] JOHN GAGNON,
Notary Public.

Filed November 3, 1883.

T. C. CUNNINGHAM, *Clerk.*

23 *Reply.*

In the Richardson County District Court, 1st Judicial District of Nebraska.

HOSFORD & GAGNON *vs.* THE HARTFORD FIRE INSURANCE COMPANY & ISRAEL MAY.

Reply of plaintiff.

Now come the plaintiffs and, for reply to the answer of defendant, The Hartford Fire Insurance Company, filed herein, and to such separate paragraph or subdivision thereof, say:

1st. They deny each and every allegation of fact in said answer contained whereby a cause or causes of defense to plaintiffs is or are sought to be set up. They deny each and every allegation of fraud and deceit in said answer contained.

2nd. They allege that F. W. Miller, the agent of said insurance company, was fully acquainted with the situation, condition, and value of the property insured and which is the subject of this action, having made a personal and careful survey and inspection of the same before taking plaintiffs' application for a policy of insurance, and knew each fact material to the risk; and upon his personal knowledge of said facts he fully concurred with the plaintiffs in their estimate of the value of such insured property and the facts touching the risk, and thereupon recommended the issue of the policy sued on herein. Plaintiffs admit that there was a small sum of money due for taxes on said property at the time the application for insurance was made, but they allege that that fact was also known to F. W. Miller, the agent of said defendant insurance company, and that, being very small in proportion to the value of the property insured and liable to be paid off at any time, it was not regarded as
24 of any consequence, and therefore was not mentioned in said application for insurance; and this, too, at the instance of the agent of said defendant company; and besides these plaintiffs deny that taxes such as are mentioned in defendant insurance company's answer are incumbrances in the term of that word as used in the policy of insurance sued on in this action.

Wherefore plaintiffs pray judgment as they have heretofore prayed.

GILLESPIE & REAVIS,
Att'ys for Plaintiffs.

STATE OF NEBRASKA, }
County of Richardson, } *ss:*

James W. Hosford, one of the plaintiffs above named, being duly sworn, on oath states that he has heard the foregoing reply read over and knows the contents thereof, and that the same is true of his own knowledge; and further saith not.

JAMES W. HOSFORD.

Sworn to before me and subscribed in my presence this 10th day of March, 1884.

GEO. D. KIRK,
Justice of the Peace.

Filed March 10th, 1884.

CHAS. LOREE, *Clerk.*

Petition for Removal.

STATE OF NEBRASKA, } ss:
County of Richardson, }

In the District Court of the 1 Judicial — of Nebraska, in and for Richardson County, Nebraska. March Term, A. D. 1884.

JAMES W. HOSFORD and CHARLES GAGNON, Partners under the Firm Name of Hosford & Gagnon,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

The petition of the Hartford Fire Insurance Company, of
25 Hartford, Connecticut, a corporation organized and still existing under and by virtue of the laws of the State of Connecticut, respectfully shows that James W. Hosford and Charles Gagnon, the plaintiffs in this suit, *and* bring their suit under the name and style of Hosford and Gagnon, and that the same was brought by said plaintiffs on or about the third day of November, A. D. 1883, against your said petitioner in said district court of said Richardson county, and that the said Hosford and Gagnon and each of them are now and were at the time of the bringing of this suit citizens of the State of Nebraska, and that your petitioner is now and was at the time of the bringing of this suit citizens of the State of Connecticut; and your petitioner further respectfully shows that they, the said plaintiffs, claim to recover in the summons and declaration & petition in this suit against your said petitioner the sum of four thousand dollars, and that the actual amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs; and your petitioner further represents that this suit is brought by the said plaintiffs to obtain and recover a judgment against your said petitioner upon a certain policy of insurance in the said declaration in this suit more particularly described, on account, as they allege, for their loss and damage by fire of a certain mill and machinery located at Rulo, Nebraska, in said Richardson county, in July or August, 1883; and your petitioner further respectfully shows that this suit has not yet been tried, and that the March term, A. D. 1884, of said district court of said Richardson county is the term of said court at which said cause could be first tried, and that the said suit is still pending for trial and undetermined in the said district court of said Richardson
26 county, and that your petitioner desires to remove this suit into the next circuit court of the United States to be held in the district of the State of Nebraska, in the eighth circuit, in provision of the law as contained in the act of Congress, approved

March 3rd, A. D. 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and other purposes."

And your petitioner is ready and willing to give good and sufficient security for its doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by —— ——, of the county of Richardson and State of Nebraska, as securities, in the penal sum of five hundred dollars, conditioned that your petitioner shall enter into the next circuit court of the United States to be held in the district of Nebraska, in the 8th circuit, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by said United States court if said court shall hold that said suit was wrongfully and improperly removed thereto, and doing such other appropriate acts as by the said act of Congress, approved March 3rd, A. D. 1875, are required to be done upon the removal of a suit into the United States court, as good and sufficient security, according to the said provisions of law.

And your petitioner therefore prays that the said bond may be accepted, and that the said suit may be removed into the next circuit court of the United States to be held in the district of Nebraska, in the 8th circuit, pursuant to the statute of the United States in such — made and provided, and that no further proceedings may be had therein by this court.

THE HARTFORD FIRE INSURANCE COMPANY,
By FRED. W. MILLER, *Agent.*

27 THE HARTFORD FIRE INSURANCE COMPANY,
By MARTIN & GILMAN, *Attorneys.*

STATE OF NEBRASKA, *Richardson County,* } ss:

I, Fred. W. Miller, being first duly sworn, say: I am the duly authorized agent of the Hartford Fire Insurance Company at Falls City, Nebraska, and have power, as such agent in Richardson county, Nebraska, to do all acts connected with the business of said company at said agency in said county.

FRED. W. MILLER.

Subscribed in my presence and sworn to before me this 10th day of March, A. D. 1884.

[SEAL.]

CHAS. LOREE,
Clerk Dist. Court.

Filed March 10, 1884.

CHAS. LOREE,
Clerk Dist. Court.

Bond.

STATE OF NEBRASKA, } ss:
County of Richardson, }

In the District Court. March Term, A. D. 1884.

JAMES W. HOSFORD and CHARLES GAGNON, Partners under the Firm Name of Hosford & Gagnon,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

We, the Hartford Fire Insurance Company, of Hartford, *Fire Insurance Company*, as principal, and W. H. Crook, of the county of Richardson and State of Nebraska, as securities, are held and firmly bound unto Hosford and Gagnon, jointly and severally, in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this tenth day of March, A. D. 1884. Whereas suit was brought on or about the third day of November, A. D. 1883, in
28 the district court of the county of Richardson and State of Nebraska, by the said Hosford and Gagnon, by the name, style, and description of Hosford & Gagnon, against the said Hartford Fire Insurance Company, and the same is now pending for trial and undetermined in the said district court of the said Richardson county, and is removable into the circuit court of the United States for the district of Nebraska, in the — circuit, under and by virtue of an act of Congress, approved March 3d, A. D. 1875, entitled "An act to determine jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;" and whereas the said Hartford Fire Insurance Company is desirous of removing said suit to said United States court and will shortly file its petition for that purpose: Now, therefore, the conditions of the above obligation are such that if the above-bounden Hartford Fire Insurance Company shall enter or cause to be entered in the circuit court of the United States for the district of the State of Nebraska, in the 8th circuit, a copy of the record in said suit on the first day of its next session, and pay or cause to be paid all the costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully and improperly removed thereto, and do or cause to be done such other appropriate acts as by said act of Congress are required to be done upon the removal of a suit into the United States court, then this obligation to be null and void; otherwise to remain in full force and virtue.

THE HARTFORD FIRE INSURANCE COMPANY,
By FRED. W. MILLER, *Agent.*
W. H. CROOK. [SEAL.]
THE HARTFORD FIRE INSURANCE COMPANY,
By MARTIN & GILMAN, *Att'ys.* [SEAL.]

This bond on this 10th day of March, 1884, approved by
29 me as to form and security thereto.

[SEAL.] CHAS. DOREE,
Clerk District Court.

Filed March 10th, 1884.

CHAS. DOREE,
Clerk Dist. Court.

STATE OF NEBRASKA, }
Richardson County, } *ss:*

I, Chas. Loree, clerk of the district court in and for Richardson county, State of Nebraska, do hereby certify that the within is a true, correct, and complete transcript of all files and entries in case 1492, Hosford and Gagnon *vs.* The Hartford Fire Insurance Company and Israel May, as shown by the original files and records now in this office.

Witness my hand and the seal of said court this 22nd day of April, 1884.

[SEAL.] CHAS. LOREE,
Clerk District Court.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 311 H. Appearance docket, No. 3, page 483. Fee docket, No. 4, page 358. Civil action. General number, 1492. District court, Richardson county, Nebraska. Hosford and Gagnon *vs.* The Hartford Fire Ins. Co. & Israel May. Action for the recovery of money on account of insurance. Filed November 3rd, 1883. T. C. Cunningham, clerk. Attorneys for plaintiff, Gillespie & Reavis. Filed May 5, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 13th day of November, 1884, the following proceedings were had and done as appears of record on folio 566, Journal "I" of said court, to wit:

JAMES W. HOSFORD *et al.*

vs.

HARTFORD FIRE INSURANCE COMPANY *et al.*

30 Now, on this day, come the defendants herein, and leave is given them to file amended answer in ten days, and cause ocntinued to January term.

Thereupon afterwards, to wit, on the 13th day of November, 1884, motion to consolidate cases was filed in said cause, which said motion to consolidate is in words and figures following, to wit:

UNITED STATES OF AMERICA:

Circuit Court, Eighth Judicial Circuit, District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Partners Doing Business under the Firm Name of Hosford & Gagnon,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

Now comes the above-named defendant and shows to the court that said plaintiffs are the plaintiffs in two actions now pending in this cause, in which actions said plaintiffs are the sole parties plaintiff and this defendant is the sole defendant; that both said actions were begun at the same time, and are both actions exclusively seeking to recover from this defendant upon two policies of insurance issued by this defendant to said plaintiffs, and the sole and only difference in said actions is that one of said policies was issued to plaintiffs by defendant upon a frame store building and the other was issued by defendant to plaintiffs upon a flouring mill; that the parties in both of said actions are the same and the issues in both of said causes are identical.

Wherefore defendants move this court to order said two causes consolidated and proceed as one action.

THURSTON, HALL & WOOLWORTH,
KRETZINGER & MARTIN,
Def'ts' Att'ys.

Upon the back of said motion to consolidate appear endorsements in words and figures following to wit: 311 & 312. H.
31 Hosford *et al. vs.* Hartford Fire Ins. Co. Motion to consolidate cases. Filed Nov. 13, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 3rd day of January, 1885, the following proceedings were had, as appears of record on folio 818, Journal "I" of said court, to wit:

Trial.

JAMES W. HOSFORD *et al.*
vs.
HARTFORD FIRE INSURANCE COMPANY *et al.* } No. 311 H.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, Wm. H. Beach; 2, C. B. Hamilton; 3, George Crow; 4, L. J. Byers; 5, R. C. Manley; 6, Roderick McGrath; 7, Wm. Fenton; 8, J. A. Wagner; 9, W. I. Broyhill; 10, L. W. Coats; 11, John Sherman; 12, Edson Rich, who were duly empaneled and sworn according to law; and, the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at ten o'clock.

Thereupon, afterwards, to wit, on the 5th day of February, 1885, amendment to answer was filed in said cause, which said amendment to answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford and Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY and ISRAEL MAY, Defendants.

Now comes the said insurance company, defendant, and, by leave of the court first had and obtained, as an amendment to the
32 answer of the said defendants filed herein, says that said plaintiffs should not have nor recover of and from said defendants, because before the issuing of the policy of insurance sued on herein, and as an inducement to this defendant to issue said policy, said plaintiffs made and signed the application mentioned in and attached to this defendant's answer, and in said application said plaintiffs stated, represented, and warranted to this defendant that the mill property mentioned in plaintiff's petition was only run and operated from 6 a. m. to 12 p. m. each day, when in truth and in fact said mill was run and operated, when in operation, for the period of 24 hours in each day. And in said application said plaintiffs covenanted and agreed to and with this defendant that the statement in said application was a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, encumbrance of all kinds, insurance and hazard of the property mentioned in the policy of insurance sued on herein, and the same was thereby made a condition of said insurance, a part of the said contract of insurance, and a continuing warranty on the part of said assured plaintiffs for the term of said policy; and this defendant avers that it was not a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, and encumbrance of all kinds, of or on the property mentioned in plaintiffs' petition; and in the policy issued by this defendant and sued on herein provided in express terms that "If the property insured being a mill or manufactory shall be run over or extra hours, or shall cease to be operated and so remain for more than ten days without notice to the company in each case and consent endorsed on the policy, then and in every such case this policy shall be void," and "any fraud or attempt at fraud or any false swearing on the part of the assured shall cause a forfeiture of all claims under this policy."

33 And this defendant avers that the mill described in plaintiffs' petition was run over and extra hours when in operation without the written consent of this defendant endorsed on the policy sued on herein, and was idle and ceased to be operated and so remained for more than ten days without notice — this defendant, and without written consent of this defendant endorsed on the pol-

icy sued on herein, and that said plaintiffs have been guilty of false swearing in their proofs of loss in their examination under oath and in other particulars.

Wherefore defendants pray, as in their answer, that they may be hence dismissed with their costs herein.

WOOLWORTH, THURSTON,
KRETZINGER & MARTIN,
Att'ys for Def'ts.

STATE OF NEBRASKA, }
District of Nebraska, Lancaster County, } *ss:*

I, Francis Martin, being first duly sworn, say I am one of the attorneys of said defendant-; that I know the contents of the foregoing amendment and believe the same to be true.

F. MARTIN.

Subscribed in my presence and sworn to before me this 5th day of Feb'ry, A. D. 1885.

ELMER D. FRANK, *Clerk.*

Upon the back of said amendment to answer appear endorsements in words and figures following, to wit: No-. 311 & 312 H. Hosford and Gagnon *vs.* The Hartford Fire Insurance Company. Amendment to answer. Filed Feb'ry 5, 1885. Elmer D. Frank, clerk. Woolworth, Thurston, Kretzinger & Martin, def'ts' att'ys.

Thereupon, afterwards, to wit, on the 6th day of Feb., 1885, reply was filed in said cause, which said reply is in words and figures following, to wit:

34 *Reply of Plaintiffs.*

In the Circuit Court of the United States, District of Nebraska.

JAMES HOSFORD and CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY & ISRAEL MAY, Defendants.

Now come the plaintiffs, and, for their reply to the answer and amendment to answer filed by defendants, say:

They deny each and every allegation of new matter and matter setting up representations or warranties in said answer contained or alleging ground of forfeiture or forfeiture of said policy. Plaintiffs further deny that in their said application for the policy they represented or stated or warranted that their said mill was run or operated only eighteen hours out of the twenty-four, or that it was run only from six o'clock a. m. till twelve o'clock p. m. Plaintiffs aver that in answer to the question asked in said application as to the time of the running of the said mill they answered and stated that the mill was run from six o'clock Monday morning till twelve o'clock Saturday night, and that the agent of the defendant, who

took said application and who procured the policies for defendants, wrote in the answers to said question, by inadvertence, mistake, or fraud, "from six o'clock a. m. till twelve p. m," which is an impossible time. Said answers were so written by defendants' agent, and he took the said application away with him and defendants have kept the same ever since, never having furnished plaintiffs with a copy thereof till long after the commencement of this action. Plaintiffs had no means of knowing of said mistakes in the application and did not discover the same until very recently and after commencement of this action.

35 Plaintiffs, further replying, say that after said fire and the loss occasioned thereby, and after plaintiffs had furnished to defendant proofs of loss as required, defendants, knowing that it was charged that smoking had been permitted, and that it was charged that the mill had been running over eighteen hours per day, called upon plaintiffs to furnish additional proofs of loss and required them to appear and to submit to an examination under oath as to proof of loss on other grounds, all of which plaintiffs did at considerable trouble and expense to them. Defendants did not then state or allow plaintiffs then to know that they claimed forfeiture of the policy on the ground of smoking or on the ground that the mill was running over eighteen hours a day, but the defendants, to conceal fraudulently any such ground of forfeiture, if any such they had, *and* thereby misled and deceived plaintiffs, to their damage in trouble and expenses. By the action aforesaid defendant is now precluded and estopped from claiming forfeiture of the policy on the said grounds, and they have thereby waived any such grounds of forfeiture, if any such ever existed, which, however, plaintiffs now deny.

REAVIS, GILLESPIE & OTHERS,
Attorneys for Plaintiffs.

THE STATE OF NEBRASKA, } *ss:*
Richardson County, }

I, James W. Hosford, being first duly sworn, say I am one of the plaintiffs in the above action; I believe the facts stated in the above reply to be true.

JAMES W. HOSFORD.

Subscribed in my presence and sworn to before me this 6th day of Febr'y, A. D. 1885.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit: No-. 311 & 312 H. Hosford
36 and Gagnon *vs.* The Hartford Insurance Company *et. al.* Reply. Filed Feb. 6, 1885. Elmer D. Frank, clerk.

Thereupon, afterwards, at said January term of said court, on the 7th day of February, 1865, the following proceedings were had and done in said cause, as appears of record on folio 841, Journal "I" of said court to wit:

Cause Submitted to Jury and Special Verdict.

JAMES W. HOSFORD *et al.*

vs.

HARTFORD FIRE INSURANCE CO. and ISRAEL MAY.

On this day again came the parties hereto, by their attorneys; also come the jury empaneled and sworn herein, and thereupon after hearing the remaining evidence, the argument of counsel, and charge of the court, said jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now come said jury into open court and present to the court their special verdict, which is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES W. HOSFORD & CHARLES GAGNON, Partners as Hosford and Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY and ISRAEL MAY, Defendants.

We, the jury, having been first duly empaneled and sworn to well and truly try the issue joined herein and a true verdict render according to the evidence, do find under the pleadings and the proofs offered in support thereof and by the direction of the court specially as follows:

36½ That the four-story brick-and-stone metal-roof *of* mill building and two-story frame metal-roof addition, known as the Rulo City mill, fixed and movable machinery, shafting, gearing, and belting contained therein, and the frame, with stone basement, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith, situated on lots five (5) and six (6), in block five (5), in Rulo, Richardson county, Nebraska, being the property described in and covered by policy No. 1056, issued by the Hartford Fire Insurance Company to Hosford and Gagnon, plaintiffs, was destroyed by fire on the first day of August, 1883, and that at that time the same was worth the sum of $19,000.00, and that the value of the property so destroyed and plaintiffs' loss was the sum of $18,500.00.

37 2nd. We find that at the time of such destruction by fire the said four-story brick-and-stone metal-roof mill building and two-story frame metal-roof addition, known as the Rulo City mills, was worth the sum of $5,000.00, and that plaintiffs' loss on that item was the sum of $5,000.00.

3rd. We find that at the time of said destruction by fire the fixed and movable machinery, shafting, gearing, and belting contained in said mill was worth the sum of $9,800.00, and plaintiffs' loss on that item was $9,300.00.

We find that at the time of said destruction by fire the said frame, with stone basement, metal-roof, steam-power grain-elevator building and addition thereto, including bins, spouts, bridges, or driveways connected therewith, were worth the sum of $3,000.00, and that plaintiffs' loss on that item was $3,000.00.

That plaintiffs in their application did not intentionally overestimate the value of the property insured, nor of the different classes thereof separately; that plaintiffs did not intentionally or fraudulently misstate the time when the mill was built; that plaintiffs forbid smoking in the mill, but smoking was done on the grinding floor; that the statements of plaintiffs in the application for insurance about water being in the mill for the extinguishment of fires were substantially true; that the water provided by plaintiffs in the mill was as convenient and accessible for the purpose of extinguishing fires as if there had been a barrel on each floor; that the water provided by plaintiffs in the mill was better fitted for extinguishing fires than if there had been only one ordinary cask or barrel on each floor; that plaintiffs in their application did not represent that the mill only ran 18 hours a day; that the mill did not stop running or lie idle for 10 days or more at any one time,
38 or for 10 days consecutively; that plaintiffs in their application did not misrepresent the amount of encumbrances or liens on said premises; that plaintiffs did not in their application fraudulently or intentionally misrepresent the amount of incumbrances or liens on said premises; that there is now due Israel May on his notes and mortgage on said mill the sum of $3,079.45; that the plaintiffs made to the defendants an application in writing, copy of which is hereto annexed marked Exhibit A & B, upon which the policies of insurance sued on were issued.

The said mill was run and operated by plaintiffs at several different times and for long periods of time continuously—twenty-four hours in each day—nor did they inform the defendants of that fact.

The said mill was not idle and not run or operated for several continuous periods of more than ten days each at different times during the life of said policy.

Said plaintiffs did not inform defendants that they were running or had run or intended to run said mill more than the hours between 6 o'clock in the morning to 12 o'clock at night and without defendants' written consent to do so.

Said mill mentioned in said policy was, at the time of said application of plaintiffs for said insurance, worth $5,000.00 and no more, and the machinery in said mill was worth $9,800.00 and no more, and the elevator was worth $3,000.00 and no more, and the machinery in the elevator was worth $1,200.00 and no more.

In their written statements to Gould, the agent of defendants, shortly after the fire, Hosford and Gagnon made several important

statements about the value and condition of the property, in which one contradicted the other, and said statements appear from
39 the evidence adduced on the trial to have been incorrect.

At the time of the issue of said policies there were upon said premises State and county taxes for several years prior thereto, which were at that time delinquent and unpaid and still remain unpaid, and amounted to the sum of $329.40 on the 14th day of May, 1883, when the application for insurance was made.

There *were* not a barrel of water on any floor of the mill, except on one floor, but there was a large tank of water in the adjoining building. When the applications were made to ag'ts and when the policies were issued the incumbrance upon the mill exceeded the sum of three thousand dollars, by way of May's mortgage, by the sum of $79.45.

Office of Hosford & Gagnon, dealers in grain, flour, feed, and native lumber.

RULO, NEBRASKA, *May* 15, 1883.

Fred., if app. requires any other ans., mark them with pencil, so that we can tell them.

Respectfully, HOSFORD & GAGNON.

To be submitted to G. F. Bissell, general agent, Chicago, before policy is issued.

Hartford Fire Insurance Co., of Hartford, Conn.

Survey of Steam Mill and Elevator.

No. 1056. Survey of Hosford & Gagnon, at Rulo, Neb. Owned and occupied by assured. Agency, Falls City, Neb. $4,000. Approved by Wm. F. Bissell, Sp. A.; rate, 4 %.

Application of Hosford and Gagnon, of Rulo, Neb., for insurance against loss or damage by fire by the Hartford Fire Insurance Company, in the sum of four thousand dollars on the property specified, the value of the property being estimated by the applicant.

40	Cash value.	Sum to be insured.	Rate.
On mill, 500 ---------- Elevator, 1,000 ---------- On building only ----------	$7,000	$1,500	4
On fixed and movable machinery only in mill ----------	11,000	2,500	4

The applicant will answer the following questions and sign the same, as a description of the premises, on which the insurance will be predicated:

1. Name, &c.—Name? Hosford & Gagnon. Location? Rulo, Richardson Co., Neb. Distance from agency where this application is made? 10 miles.

2. Building.—Of what material? Brick, stone, & frame. Kind of roof? Metal. When built? 1879, 1880, 1882. Cost when repaired? $7,000. Size of building? See diagram. Stories high? 2, 3, & 4. Any stairways in building? Yes. Are belt holes and door sills raised for flooding? Yes. Number of employés? 7.

3. Boiler-house.—What material? Stone. Height? 14. Roof? Metal. Kind of floor? None. Any openings to main buildings? Yes. Are they protected by iron doors? No. Any dry-room in boiler-house? No. Any machinery other than boiler and engine in boiler-house? No. Is boiler-room whitewashed inside? No.

4. Boiler, smoke-stack, & engine.—Boilers, how many? 2. Arched with brick? Yes. How thick are arch walls? 18 in. Distance from wood? 5 ft. Kind of fuel used? Coal, wood, and cobs. Stack, brick or iron? Iron. If iron, how far is wood of roof from stack and how protected? 6 in.; cov. with metal. Height above roof of building? 18 ft. Any spark catcher? No. Where is engine located? West of & adjoining boiler.

6. Machinery.—Does any shafting or machinery run in wooden boxes? No. Is frame-work substantial? Yes. Has any part settled or sagged? No. Does shafting run true and cool? Yes. What kind of oil used for lubricating? Lard & machine. Is oiling done at regular hours each day? Yes. Is this duty assigned to a special man? Yes. Is machinery all in good repair? Yes. What is average age of machinery? 2 years. Is it crowded? No. Is there any machinery not in use? No.

7. Dry-room.—Any on premises? None.

8. Heating.—How heated? Stoves. How many? 1. What under them? Zinc. How far from wood-work? Safe distance. What kind of fuel is used? Wood. Are stove-pipes well secured? Yes. Do they pass through floor or partition? No. Do they enter chimney? Yes. Are chimneys built from the ground? Yes. Are ashes ever kept in building? No.

9. Lights.—What is used for lights? Kerosene. What is its fire test? 150. Where kept and how? Tin can. Any open lights used? No. Are lamps filled and trimmed by daylight only? Yes.

41 10. Facilities for putting out fire.—Any force pump on premises? No. Is there stand pipe to top of building, with plug and hose attached in each story? No. Give source and extent of water supply. Casks of water on each floor. How many casks of water? 1. Where located? On each floor. How many buckets? 2 with ea. cask. Where kept? Casks. Distance to nearest fire engine? None. Is there scuttle in roof? Yes.

11. Watchman and hours of work.—Is watchman employed? No. During what hours is mill (or factory) operated? From 6 a. m. to

12 p. m. Is building ever left alone? Yes. If no watchman, are premises carefully examined after stopping machinery to see that all is safe? Yes.

12. Ownership.—Is property owned and operated by applicant? Yes. Is it now operated? Yes. Is it profitable and has it been for past year? Yes. Is ground owned by applicant? Yes. Has he unquestioned title in fee simple? Yes. Has there ever been litigation concerning property? No.

13. Incumbrance.—Is there a mortgage, trust deed, lien, or incumbrance of any kind on property? Yes. Amount and in whose favor? $3,000.00; I. May. What is the entire value of property encumbered? $21,000.

14. Cash value.—What is cash value of building or buildings above foundation? $7,000. Machinery? $11,000. Boiler and engine? $5,000.

15. Insurance.—What is amount of insurance on building? $4,500. On machinery? $7,500. On boiler and engine? —. Are all policies concurrent? Yes. What companies, what amount each, and at what rates? (State fully.) Underwriters of N. Y., $8,000, 4 per cent.; Hartford, $4,000, 4 per cent.

16. Litigation & loss.—Is there now or has there ever been any litigation about this property or power? No. Have you ever suffered loss of property by fire? No.

17. Incendiarism and fire.—Have you any reason to believe that property is in any danger from incendiaries? No. Any threats ever been made? No. Is there now or has there ever been strikes or trouble with the employés? No. Have the premises ever been on fire? No.

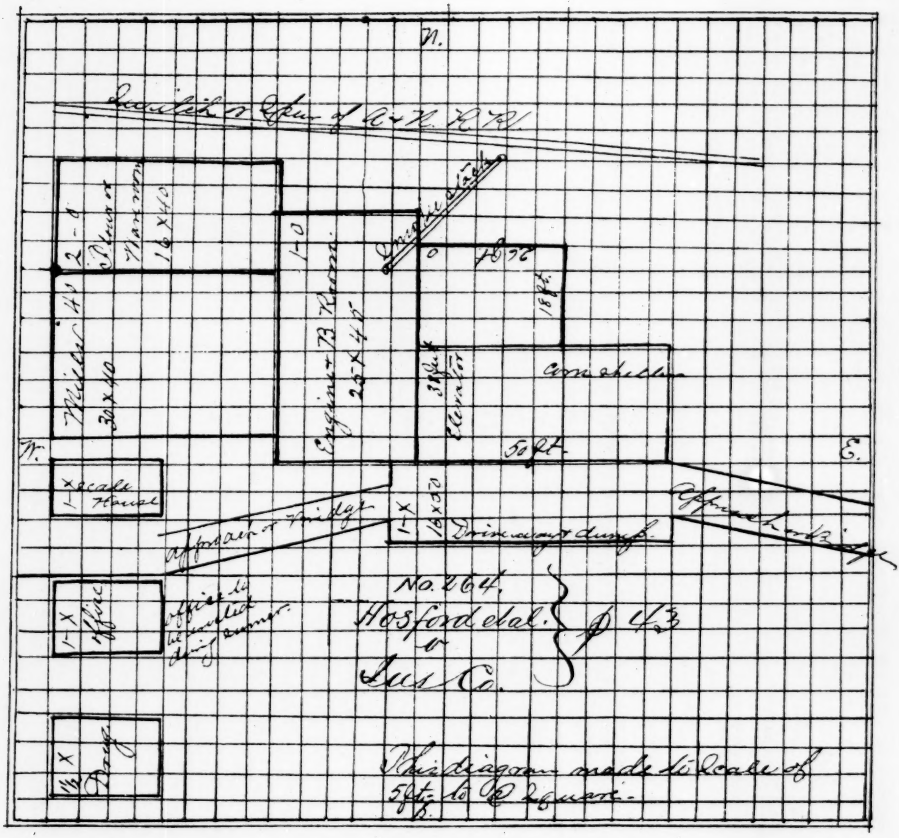
Applicants will answer such of following questions as apply to risk on which insurance is desired:

18. Kind of goods made? Flour. Are oiled rags and waste kept in metal vessels and burned every night? Yes.

20. Elevator.—Is it for wheat or corn? Both. If corn sheller, where located? See diagram. If feed-mill, where located? None. Are all bearings carefully oiled? Yes. Have elevator shafts iron boots? No. Is friction of elevator belts and pulleys carefully watched? Yes.

21. Flour-mills.—Kind of mill—"merchant" or "custom grist-mill?" Both. Daily capacity in barrels? 60. How many run of stones? 5. How many sets rollers? None. How many bran dusters and separators, and where located? 1—top floor; 2 separators. How many smut machines and where located? 1—on ground floor. Whose make or pattern? California. Are lower boxes constantly supplied with tallow? Yes. What time operated? 1—4. How many revolutions per minute? 650. Are they in plain view and accessible? Yes. Is dust blown out of mill? Yes. Is there a "dust-room?" No. Any other cleaning machines in mill? No. Middling purifiers—how many? 2. Kind—open or closed? 42 Smith Ag., city. Do you agree that no open lights shall be used in mill? Yes. Is machinery crowded in any part of

DESCRIPTION OF EXPOSURES.



mill so it is unsafe for men to go to any machine while mill is running? No. Is there a grain, meal, or corn dryer, and where located? No. Is there a corn sheller, and where located? Yes; in elevator. Do you agree to keep mill clean and free from dangerous accumulation of dust? Yes.

And the said applicant hereby covenants and agrees to and with said company that the foregoing and diagram annexed hereto is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, encumbrance of all kinds, insurance, and hazard of the property to be insured, and the same is hereby made a condition of the insurance, a part of the contract, and a continuing warranty on the part of assured for term of policy or any renewal thereof of which this survey and application form a part.

Dated at Rulo, Neb., this 16th day of May, 1883.

$4,000 for 1 year, @ — per cent.

HOSFORD & GAGNON,
Applicant.

Diagram of Premises.

Applicants.—Give below ground plan of premises to be insured; also a diagram of all buildings within 150 feet, designating material of which they are built and for what purposes occupied, and note particularly location of all fire apparatus, force pumps, stand pipes, sprinklers, water pipes and hydrants, tanks and chimneys, which diagram, with the answers to the foregoing interrogatories, form a part of the contract of insurance.

Use red ink for brick or stone and black for frames. Mark distances, calling each square 10 feet, and give all exposures within 150 feet.

(Here follows diagram marked p. 43.)

43 If, upon the pleadings and the foregoing facts, the court shall be of the opinion that the plaintiffs are entitled to judgment the sum which they ought to recover amounts to $4,160.00, and we therefore find for the plaintiffs and assess their damages at the said sum of $4,160.00 against the Hartford Fire Insurance Company on the mill.

EDSON RICH, *Foreman.*

Thereupon afterwards, to wit, on the 11th day of February, 1885, motions for judgment were filed in said case, which said motions for judgment are in words and figures following, to wit:

44 *Motion.*

In the Circuit Court of the United States, District of Nebraska.

CHARLES GAGNON and JAMES W. HOSFORD, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, Defendants.

Now come the plaintiffs in the above-entitled case, by their attorneys, and move the court to enter judgment in favor of plaintiffs upon the findings of the jury.

That by said findings plaintiffs are entitled to judgment for the sum of $1,642.20.

T. M. MARQUETT,
Att'y for Pl'ffs.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 311 H. Circuit court U. S., dist. Nebr. Hosford & Gagnon *vs.* The Hartford Ins. Co. Motion. Filed Feb. 11, 1885. Elmer D. Frank, clerk. T. M. Marquett, pl'ffs' att'y.

In the United States Circuit Court, District of Nebraska.

JAMES W. HOSFORD & CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, Defendants.

(Two cases consolidated.)

Now come the above-named defendants and move the court to enter judgment in said cases in favor of said defendants upon the verdicts of the jury heretofore entered herein.

WOOLWORTH, THURSTON,
KRETZINGER & MARTIN,
Att'ys for Defendants.

Upon the back of said motion for judgment appear endorsements in words and figures following, to wit: No. 311 & 312 H. Hos-
45 ford and Gagnon *vs.* Hartford Ins. Co. Motion for judgment. Filed Feb. 11, 1885. Elmer D. Frank, clerk. Woolworth, Thurston, Kretzinger & Martin, def'ts' att'ys.

Thereupon afterwards, at the May term of said court, on the 2nd day of July, 1885, the following proceedings were had and done in said case, as appears of record on folio —, Journal "K," of said court, to wit:

Judgment.

JAMES W. HOSFORD and CHARLES GAGNON
vs.
THE HARTFORD FIRE INSURANCE CO. } 311 H.

This cause came on to be heard before the circuit judge and the district judge upon the several motions of the parties for judgment upon the special verdict heretofore rendered therein, and the circuit judge being of the opinion that the said judgment should be for the defendants, and the district judge being of the opinion that the judgment should be for the plaintiffs, it is thereupon ordered, considered, and adjudged that the petition herein be dismissed, and that the defendants have and recover of and against the plaintiffs their costs of this action, to be taxed by the clerk; and thereupon the said judges, being divided in opinion as aforesaid, signed their certificate in that behalf for the decision of the Supreme Court of the United States upon the point of difference between them.

And thereupon, to wit, on the said 2nd day of July, 1885, certificate of division was filed in said cause, which said certificate of division is in words and figures following, to wit:

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford and Gagnon, Plaintiffs,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, Def'ts. } 311 H.

46 Upon the consideration of the verdict and special findings of the jury returned herein, final judgment having been rendered thereon for the defendants, the opinion of the judges holding said court, namely, the circuit judge and the district judge, were opposed upon the following questions thereon arising, to wit:

1st. Whether the plaintiffs or the defendants, insurance company, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

2nd. Whether the fact that delinquent taxes on the mill, to the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurer, will defeat the plaintiffs' right to recover.

And the said points being at the time stated under the direction of the said judges, it is ordered that the said points be, and they are hereby, certified to the Supreme Court of the United States according to the statute in such case provided.

DAVID J. BREWER,
Circuit Judge.
ELMER S. DUNDY,
District Judge.

44 *Motion.*

In the Circuit Court of the United States, District of Nebraska.

CHARLES GAGNON and JAMES W. HOSFORD, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, Defendants.

Now come the plaintiffs in the above-entitled case, by their attorneys, and move the court to enter judgment in favor of plaintiffs upon the findings of the jury.

That by said findings plaintiffs are entitled to judgment for the sum of $1,642.20.

T. M. MARQUETT,
Att'y for Pl'ffs.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 311 H. Circuit court U. S., dist. Nebr. Hosford & Gagnon *vs.* The Hartford Ins. Co. Motion. Filed Feb. 11, 1885. Elmer D. Frank, clerk. T. M. Marquett, pl'ffs' att'y.

In the United States Circuit Court, District of Nebraska.

JAMES W. HOSFORD & CHARLES GAGNON, Partners as Hosford & Gagnon, Plaintiffs,

vs.

THE HARTFORD FIRE INSURANCE COMPANY, Defendants.

(Two cases consolidated.)

Now come the above-named defendants and move the court to enter judgment in said cases in favor of said defendants upon the verdicts of the jury heretofore entered herein.

WOOLWORTH, THURSTON,
KRETZINGER & MARTIN,
Att'ys for Defendants.

Upon the back of said motion for judgment appear endorsements in words and figures following, to wit: No. 311 & 312 H. Hos-
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Thereupon afterwards, at the May term of said court, on the 2nd day of July, 1885, the following proceedings were had and done in said case, as appears of record on folio —, Journal "K," of said court, to wit:

Judgment.

JAMES W. HOSFORD and CHARLES GAGNON } 311 H.
vs.
THE HARTFORD FIRE INSURANCE CO.

This cause came on to be heard before the circuit judge and the district judge upon the several motions of the parties for judgment upon the special verdict heretofore rendered therein, and the circuit judge being of the opinion that the said judgment should be for the defendants, and the district judge being of the opinion that the judgment should be for the plaintiffs, it is thereupon ordered, considered, and adjudged that the petition herein be dismissed, and that the defendants have and recover of and against the plaintiffs their costs of this action, to be taxed by the clerk; and thereupon the said judges, being divided in opinion as aforesaid, signed their certificate in that behalf for the decision of the Supreme Court of the United States upon the point of difference between them.

And thereupon, to wit, on the said 2nd day of July, 1885, certificate of division was filed in said cause, which said certificate of division is in words and figures following, to wit:

JAMES W. HOSFORD and CHARLES GAGNON, Partners as Hosford and Gagnon, Plaintiffs, } 311 H.
vs.
THE HARTFORD FIRE INSURANCE COMPANY, Def'ts.

46 Upon the consideration of the verdict and special findings of the jury returned herein, final judgment having been rendered thereon for the defendants, the opinion of the judges holding said court, namely, the circuit judge and the district judge, were opposed upon the following questions thereon arising, to wit:

1st. Whether the plaintiffs or the defendants, insurance company, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

2nd. Whether the fact that delinquent taxes on the mill, to the amount of $329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurer, will defeat the plaintiffs' right to recover.

And the said points being at the time stated under the direction of the said judges, it is ordered that the said points be, and they are hereby, certified to the Supreme Court of the United States according to the statute in such case provided.

DAVID J. BREWER,
Circuit Judge.
ELMER S. DUNDY,
District Judge.

Upon the back of said certificate of division appear endorsements in words and figures following, to wit: No. 311 H. United States circuit court, district of Nebraska. James W. Hosford *et. al. vs.* Hartford Fire Insurance Company. Certificate of division. Filed July 2, 1885. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on said 2nd day of July, 1885, a writ of error was allowed and a citation issued in said case, of which the following are the originals:

47 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between James W. Hosford and Charles Gagnon, copartners in business under the firm name of Hosford & Gagnon, plaintiffs, and The Hartford Fire Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 2nd day of July, 1885.

ELMER D. FRANK, *Clerk.*

Allowed by—
DAVID J. BREWER,
Circuit Judge.

[Endorsed:] No. 311 H. United States circuit court, district of Nebraska. James W. Hosford *et al.*, pl'ffs in error, *vs.* Hartford Fire Insurance Co., def't in error. Writ of error. Filed July 2, 1885. Elmer D. Frank, clerk.

48 THE UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

To the Hartford Fire Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein James W. Hosford *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 2nd day of July, 1885.

DAVID J. BREWER,
Circuit Judge.

48½ [Endorsed:] No. 311 H. United States circuit court, district of Nebraska. James W. Hosford *et al.*, pl'ffs in error, *vs.* Hartford Fire Insurance Co., def't in error. Citation. Filed July 2, 1885. Elmer D. Frank, clerk.

Service of within citation admitted this 7th day of July, 1885.

J. M. WOOLWORTH,
Att'y for Def't.

49 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios from one to — contain true and faithful transcripts from the records and files of said court in the case of James W. Hosford and Charles Gagnon *vs.* Hartford Fire Insurance Company, and that copies of the writ of error and citation have been lodged and remain in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 22nd day of July, A. D. 1885.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 264. James W. Hosford & Charles Gagnon, copartners under the firm name of Hosford and Gagnon, plaintiffs in error, *vs.* The Hartford Fire Insurance Company. Filed August 3, 1885.

1-404
127-404

IN THE

Supreme Court of the United States.

JAMES F. HOSFORD AND CHARLES GAGNON,
CO-PARTNERS UNDER THE FIRM NAME OF
HOSFORD & GAGNON,
Plaintiffs in Error,

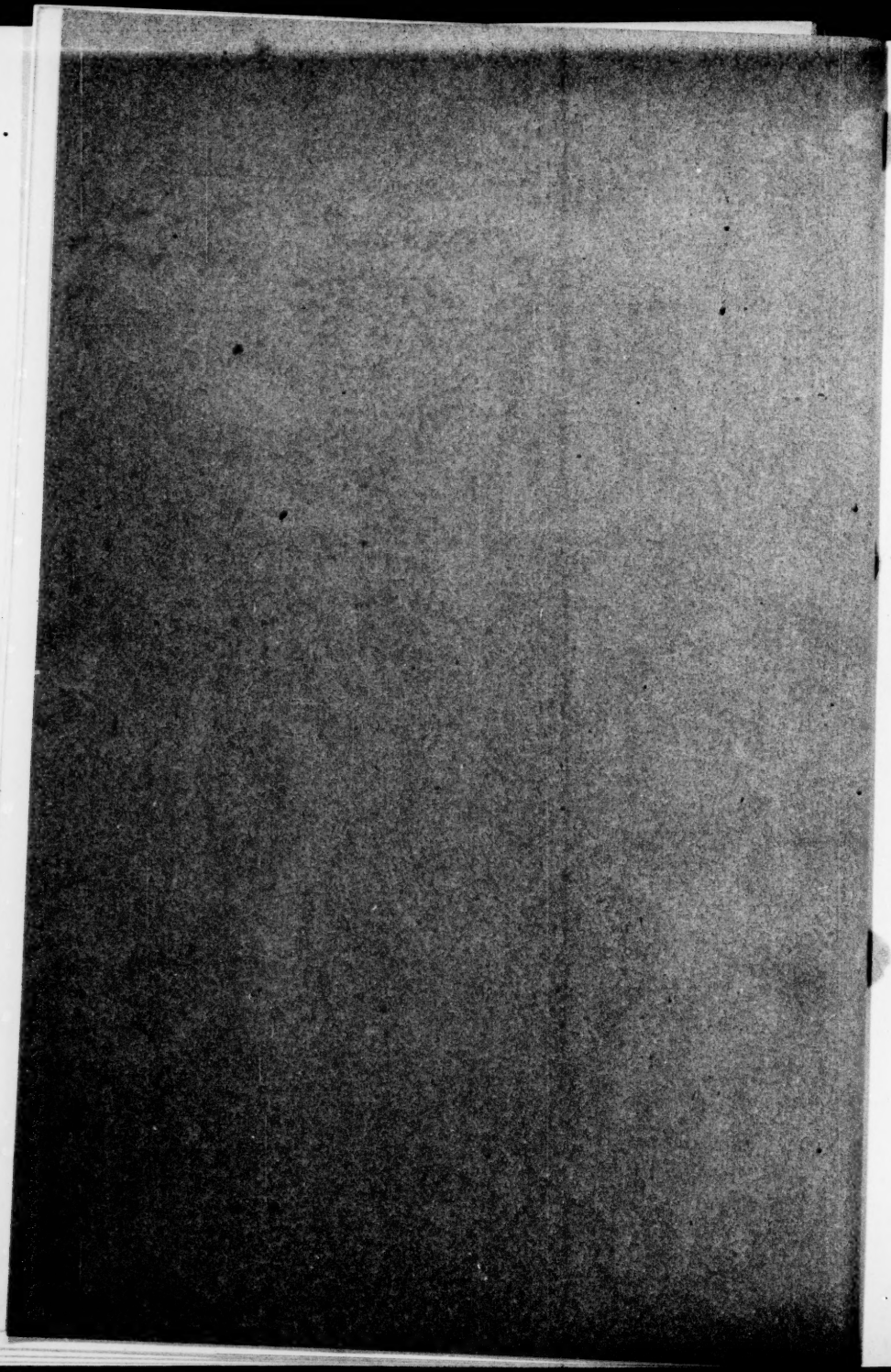
vs.

HARTFORD FIRE INSURANCE COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

T. M. MARQUETT,
ISHAM REAVIS,
Attorneys for Plaintiffs in Error.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

JAMES F. HOSFORD AND CHARLES GAGNON, CO-PARTNERS UNDER THE FIRM NAME OF HOSFORD & GAGNON,
Plaintiffs in Error,
vs.
HARTFORD FIRE INSURANCE COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

POINT FIRST.

This is a case sent to this court on a certificate of division between the circuit and district judges in and for the district of Nebraska.

There are two points of difference, which are as follows:

1st. Whether the plaintiffs or defendant Insurance Company are entitled in law to recover judgment on said verdict and special findings which the jury returned in said case.

I.

AMOUNT OF THE MORTGAGE.

The question asked:

Is there a mortgage, trust deed, lien, or incumbrance of any kind on the property?	Yes.
Amount and in whose favor?	$3,000. I. May.

The amount, and in whose favor? The most natural import of this inquiry is, have you heretofore mortgaged the property, and if so in whose favor, and to what amount, and the answer would be the amount stated in the mortgage, not including any interest that might afterwards accrue.

That is just what the answer was. The jury finding in reference to that is as follows:

1st. The plaintiffs in their application did not misrepresent the amount of incumbrances or liens on said premises.

2d. The plaintiffs did not in their application fraudulently or intentionally misrepresent the amount of incumbrances or liens on said premises.

3d. That there is now due Israel May on his notes and mortgages on said mill, the sum of $3,079.45.

When the applications were made to agents, and when the policies were issued, the incumbrance upon the mill exceeded the sum of $3,000 by way of May's mortgage by the sum of $79.45.

This last finding seems to contradict the other finding. The jury evidently understood the question to mean what was the

amount of the original mortgage without any interest, and they therefore found that the plaintiffs in their application did not misrepresent the amount of incumbrances or liens on said premises.

This construction harmonizes and gives sense to the findings; otherwise the findings are so contradictory that no court ought to forfeit an insurance policy based upon such contradictory findings. But this principle is likewise laid down in Wood on Fire Insurance. "We do not suppose entire precision is required in such a statement, or that an omission to state a small amount of accumulated interest would avoid a policy."

Wood on Fire Insurance, 304, Sec. 158.

In fact it is not supposed that in a mere off-hand question that anybody can tell exactly the amount of mortgage that is due upon his property, or could state the precise amount of accumulated interest.

II.

There is another finding in which it is said that the proprietors, Hosford and Gagnon, made several important statements about the value and condition of the property, in which one contradicted the other, and said statements appear from the evidence adduced on the trial, to have been incorrect. This refers more especially to the value of the property, and after the property was burned. They did not agree exactly upon the value. As scarcely any two persons will agree upon the value of real estate or the value of personal property, it hardly could be expected that their statements would be the same. In fact if they had stated exactly alike as to the value, it would have been a sign that their statements were connived, or made up between them-

selves. There was some difference about the amount of wheat or flour on hand at the time, but this could easily happen. We do not think that there is anything in that finding to prevent a judgment.

Wood on Fire Ins., page 425.
Franklin Fire Ins. vs. Vaughn, 92 U. S., 516.

The finding in reference to water is, that the statements in the application about water for extinguishing fire being in the mill were substantially true, and that the water provided by plaintiffs in the mill was as convenient and accessible for the purpose of extinguishing fire as if there had been a barrel or cask on each floor, and that the water provided by the plaintiffs in the mill was better fitted to extinguish fires than if there had been only an ordinary cask of water on each floor. Showing that as far as water was concerned that the mill was better fixed than what they said it was.

Wood on Fire Ins., page 321.
Aurora Fire Ins. Co. vs. Eddy, 50 Ill., 106.

POINT SECOND.

Whether the fact that delinquent taxes on the mill to the amount of $329 were due and unpaid at the time the application for insurance on the property destroyed was made, and that the fact was not disclosed by the applicant to the insurer will defeat the plaintiffs' right to recover.

The jury find on that:

1st. That plaintiffs in their application did not misrepresent the amount of incumbrances or liens on said premises.

They afterwards find that there was $329.40 of delinquent taxes unpaid at the time of the application.

I.

The questions put are:

13th. Is there a mortgage, trust deed, lien, or incumbrance of any kind on the property? Yes.
Amount, and in whose favor? $3,000. I. May.

The court will notice that here are jumbled together some four or five questions: Is there a mortgage, or is there a trust deed, or is there a lien, or is there any incumbrance of any kind upon the property. Now they will notice that the answer is in reference to a mortgage; amount, and in whose favor? $3,000. I. May. This is, to say the most about it, an imperfect answer to all of these questions. In fact the number propounded were propounded so as to induce confusion, and the party answers as to the first His mind is first directed to the mortgage, and he answers as to that, but does not answer as to the other. It is a clear case of what is known as an imperfect answer to the question, and the insurance company issues the policy without further inquiry, and they waive the want, or imperfection in the answer, and render the omission or answers more fully, immaterial.

Phœnix Life Ins. Co. vs. Raddin, 120 U. S., 190.

This application is dated the 16th of May, 1883. The policy refers to the insurance and application of the Underwriters, which applications were two days before, and in that application in order to get the $8,000 insurance which is referred to in the policy of the defendants in error, the only reference made to incumbrances was, "If mortgaged, state the amount," and he says,

$3,000. When two days later the plaintiffs are asked about mortgages, liens, and so on, they only answer to the mortgage lien alone; that had been the question put to them by the Underwriters. So it comes fairly under the proposition that it was an imperfect answer, and by waiving further inquiry the insurance company rendered the omission to answer more f lly, immaterial.

Connecticut Ins. Co. vs. Lux, 108 U. S., 498.
Hall vs. People's Ins. Co., 6 Gray, 185.
Lorillard's Ins. Co. vs. McCullogh, 21 Ohio St., 176.
American Ins. Co. vs. Mahone, 56 Miss., 180.
Carson va. Jersey City Ins. Co., 14 Vroom, 300.
15 Vroom, 210.
Lebanon Ins. Co. vs. Kepler, 106 Pa., 28.

II.

It clearly comes under the rule laid down in section 161 of Wood on Fire Insurance, page 309, where he says, "If the answer is not *prima facie* a complete answer to the inquiry upon its face, and puts the insurer upon further inquiry, and he issues a policy without eliciting or seeking to elicit further information in reference thereto, he waives a fuller answer, and cannot avoid liability upon the ground that the assured has concealed material facts. He takes the application and the answer as made there, and assents to take the risk with an imperfect knowledge of the amount of the incumbrance and thereby assumes all the consequences incident to his negligence in that risk."

Hawley vs. Dorchester Ins. Co., 12 Gray (Mass.), 545.
Commissioners vs. Hide and Leather Co., 112 Mass., 136.
Dayton Ins. Co. vs. Kelley, 24 Ohio State, 345.
Bath vs. City Ins. Co., 6 McLean, U. S., 334.

The question as to tax liens is unanswered.

Carson vs. Jersey City Fire Insurance Co., 43 N. J. Law, 300.

III.

The question asked first, "Is there a mortgage, trust deed, lien, or incumbrance of any kind on the property?" "Yes." "Amount, and in whose favor?" is the second, "$3,000. L. May."

Now that is correct as far as it goes. The last question, the question that asks the amount and in whose favor, evidently refers to incumbrances created by the insured, and has no application to those created by the operation of law, such as taxes; because the question is a double one. What is the amount, and what person holds the lien? This would call the mind of the insurer to the liens that he himself had given, but would not call to the mind tax liens, because he is required to give the amount of the lien and to whom it was given, who holds it. The question is misleading if it intended to cover taxes or liens created by law.

Bailey vs. Homestead Fire Ins. Co., 80 N. Y., 21.
36 Am. and Eng. Reports, 571.

To make it more clear that the question which asks "amount, and in whose favor" refers to incumbrance created by the insured, we find that at this time of the year, to-wit: in May, no man knows what his liens or incumbrances for taxes are or can tell what they amount to.

The Compiled Statutes of Nebraska, 1887, page 611, Sec. 138, reads as follows: "All taxes assessed on real property shall be a lien thereon from and including the 1st day of April, in the year in which they are levied until the same are paid."